

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACOB SILVERMAN,

Plaintiff,

v.

HUMBOLDT COUNTY CORRECTIONAL
FACILITY, et al.,

Defendants.

Case No. [17-cv-01140-KAW](#) (PR)

**ORDER DIRECTING SERVICE OF
COGNIZABLE CLAIM; DIRECTING
PLAINTIFF TO PROVIDE NAME AND
ADDRESS OF ONE DEFENDANT;
DIRECTING CLERK TO DESIGNATE
CASE AS A CIVIL RIGHTS ACTION**

Jacob Silverman originally filed a petition for a writ of habeas corpus. On August 1, 2017, the Court issued an order finding the allegations in the petition asserted civil rights claims and, thus, should have been submitted in a civil rights action, not a habeas petition. The Court allowed Silverman to consent to convert the petition to a civil rights complaint under 42 U.S.C. § 1983 or to withdraw the petition. On August 7, 2017, Silverman filed an amended complaint, indicating that he wishes to convert this petition to a civil rights action. The clerk of the court is directed to designate this case as a civil rights action. Silverman has filed an updated request to proceed in forma pauperis, which is granted in a separate order. The Court now reviews the amended complaint.

DISCUSSION

I. Preliminary Review of Complaint

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*

1 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
2 Cir. 1988).

3 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
4 claim showing that the pleader is entitled to relief.” “Specific facts are not necessary; the
5 statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon
6 which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
8 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
9 the alleged violation was committed by a person acting under the color of state law. *West v.*
10 *Atkins*, 487 U.S. 42, 48 (1988).

11 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the
12 plaintiff can show that the defendant’s actions both actually and proximately caused the
13 deprivation of a federally protected right. *Lemire v. Cal. Dept. Corrections & Rehabilitation*, 756
14 F.3d 1062, 1074 (9th Cir. 2013); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988. A person
15 deprives another of a constitutional right within the meaning of section 1983 if he does an
16 affirmative act, participates in another's affirmative act or omits to perform an act which he is
17 legally required to do, that causes the deprivation of which the plaintiff complains. *Id.* at 633.
18 Under no circumstances is there respondeat superior liability under section 1983. *Lemire*, 756
19 F.3d at 1074. A supervisor may be liable under section 1983 upon a showing of (1) personal
20 involvement in the constitutional deprivation or (2) a sufficient causal connection between the
21 supervisor's wrongful conduct and the constitutional violation. *Henry A. v. Willden*, 678 F.3d 991,
22 1003-04 (9th Cir. 2012).

23 Local governments are "persons" subject to liability under 42 U.S.C. § 1983 where official
24 policy or custom causes a constitutional tort, *see Monell v. Dep't of Social Servs.*, 436 U.S. 658,
25 690 (1978); however, a city or county may not be held vicariously liable for the unconstitutional
26 acts of its employees under the theory of respondeat superior, *see Board of Cty. Comm'rs. of*
27 *Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691. To impose municipal
28 liability under § 1983 for a violation of constitutional rights resulting from governmental inaction

or omission, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving force behind the constitutional violation. *Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

II. Plaintiff's Claim

In his amended complaint, Plaintiff names as defendants Humboldt County Correctional Facility Lieutenant Christian, the Humboldt County Jail Owner, Sheriff Honsal (in his official capacity) and the owners and operators of the Humboldt County Jail kitchen. In his complaint and his original habeas petition, Plaintiff alleges the following: Plaintiff is of the Jewish religion. He requested a religious kosher meal per "the Halal Act" protocol. Instead, he received a "no pork diet." He ate it, but got sick. Then, he requested "an authentic kosher diet" but has not received it. The jail's response to Plaintiff's administrative complaint was that a no-pork diet is the only diet the facility could provide. ECF No. 1-12.

Inmates "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987). Allegations that prison officials refuse to provide a healthy diet conforming to sincere religious beliefs states a cognizable claim under § 1983 of denial of the right to exercise religious practices and beliefs. *Shakur v. Schriro*, 514 F.3d 878, 884 (9th Cir. 2008) (refusal to provide religious meal states claim for violation of Free Exercise Clause and claim under Religious Land Use and Institutionalized Persons Act "RLUIPA"); *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (Jewish inmate claiming denial of kosher diet), *cert. denied*, 510 U.S. 1192 (1994).

Liberally construed, the allegations appear to give rise to cognizable claims under the Free Exercise Clause and RLUIPA against all named Defendants, with Sheriff Honsal, in his official capacity, representing Humboldt County. However, Plaintiff must provide the Court with the name and address of the owner/manager of the Humboldt County Jail kitchen so the Court may direct service on this entity.

1 **CONCLUSION**

2 Based on the foregoing, the Court orders as follows:

3 1. The allegations, liberally construed, appear to give rise to cognizable claims under the
4 Free Exercise Clause and RLUIPA against all Defendants. However, to order service on the owner
5 and/or manager of the Humboldt County Jail kitchen, the Court must know its name and current
6 address. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994), *abrogated on other grounds by*
7 *Sandin v. Conner*, 515 U.S. 472 (1995) (inmate proceeding *in forma pauperis* entitled to rely on U.S.
8 Marshal for service, but must furnish information necessary to identify and locate defendants); *see also*
9 Fed. R. Civ. P. 4m (if defendant not served in 120 days, court must dismiss action without prejudice
10 against that defendant). Within twenty-eight (28) days from the date of this Order, Plaintiff is to file
11 with the Court the name and address of the manager and/or owner of the Humboldt County Jail
12 kitchen. If Plaintiff does not do so, the claims against this Defendant will be dismissed without
13 prejudice.

14 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service
15 of Summons, two copies of the Waiver of Service of Summons, a copy of the original petition
16 (docket no. 1), amended complaint (docket no. 9), and all attachments thereto, a copy of this Order
17 and a copy of the form "Consent or Declination to Magistrate Judge Jurisdiction" to Humboldt
18 County Correctional Facility Lieutenant Christian and Sheriff Honsal, in his official capacity.
19 This form can also be found at www.cand.uscourts.gov/civilforms. The Clerk shall also mail a
20 copy of the petition, the amended complaint and a copy of this Order to the Office of the
21 Humboldt County Counsel, and a copy of this Order to Plaintiff.

22 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure require
23 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
24 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
25 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
26 such service unless good cause be shown for their failure to sign and return the waiver forms. If
27 service is waived, this action will proceed as if Defendants had been served on the date that the
28 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve

1 and file an answer before sixty days from the date on which the request for waiver was sent. (This
2 allows a longer time to respond than would be required if formal service of summons is
3 necessary.)

4 Defendants are advised to read the statement set forth at the foot of the waiver form that
5 more completely describes the duties of the parties with regard to waiver of service of the
6 summons. If service is waived after the date provided in the Notice but before Defendants have
7 been personally served, the answer shall be due sixty days from the date on which the request for
8 waiver was sent or twenty days from the date the waiver form is filed, whichever is later.

9 4. Defendants shall file their Consent or Declination to Magistrate Judge Jurisdiction on or
10 before the date their answer is due.

11 5. The following briefing schedule shall govern dispositive motions in this action:

12 a. No later than thirty days from the date their answer is due, Defendants shall file
13 a motion for summary judgment or other dispositive motion. If Defendants file a motion for
14 summary judgment, it shall be supported by adequate factual documentation and shall conform in
15 all respects to Federal Rule of Civil Procedure 56. If Defendants are of the opinion that this case
16 cannot be resolved by summary judgment, they shall so inform the Court prior to the date the
17 summary judgment motion is due. All papers filed with the Court shall be promptly served on
18 Plaintiff.

19 At the time of filing the motion for summary judgment or other dispositive motion,
20 Defendants shall comply with the Ninth Circuit's decision in *Woods v. Carey*, 684 F.3d 934 (9th
21 Cir. 2012), and provide Plaintiff with notice of what is required of him to oppose a summary
22 judgment motion. If the motion is based on non-exhaustion of administrative remedies,
23 Defendants must comply with the notice and procedural requirements in *Albino v. Baca*, 747 F.3d
24 1162 (9th Cir. 2014). *See Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

25 b. Plaintiff's opposition to the motion for summary judgment or other dispositive
26 motion shall be filed with the Court and served on Defendants no later than twenty-eight days after
27 the date on which Defendants' motion is filed. The Ninth Circuit has held that the following notice
28 should be given to *pro se* plaintiffs facing a summary judgment motion:

1 The defendants have made a motion for summary judgment by which they seek to have
2 your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules
3 of Civil Procedure will, if granted, end your case.

4 Rule 56 tells you what you must do in order to oppose a motion for summary judgment.
5 Generally, summary judgment must be granted when there is no genuine issue of material
6 fact -- that is, if there is no real dispute about any fact that would affect the result of your
7 case, the party who asked for summary judgment is entitled to judgment as a matter of law,
8 which will end your case. When a party you are suing makes a motion for summary
9 judgment that is properly supported by declarations (or other sworn testimony), you cannot
10 simply rely on what your complaint says. Instead, you must set out specific facts in
11 declarations, depositions, answers to interrogatories, or authenticated documents, as
12 provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and
13 documents and show that there is a genuine issue of material fact for trial. If you do not
14 submit your own evidence in opposition, summary judgment, if appropriate, may be
15 entered against you. If summary judgment is granted [in favor of the defendants], your
16 case will be dismissed and there will be no trial.

17 *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

18 Before filing his opposition, Plaintiff is advised to read the notice that will be provided to
19 him by Defendants when the motion is filed, and Rule 56 of the Federal Rules of Civil Procedure
20 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (party opposing summary judgment must come
21 forward with evidence showing triable issues of material fact on every essential element of his
22 claim). Plaintiff is cautioned that because he bears the burden of proving his allegations in this
23 case, he must be prepared to produce evidence in support of those allegations when he files his
24 opposition to Defendants' summary judgment motion. Such evidence may include sworn
25 declarations from himself and other witnesses to the incident, and copies of documents
26 authenticated by sworn declaration. Plaintiff will not be able to avoid summary judgment simply
27 by repeating the allegations of his complaint.

28 The same evidentiary requirement applies if the defendants file a motion for summary
judgment for failure to exhaust administrative remedies. To oppose this motion, Plaintiff must
present any evidence he may have which tends to show that he did exhaust administrative
remedies or was excused from doing so. Again, the evidence may be in the form of declarations,
that is statements of fact from himself or other witnesses signed under penalty of perjury, copies of
documents accompanied by a declaration showing where they came from and why they are

1 authentic, or discovery documents such as answers to interrogatories or depositions. In
2 considering a summary judgment motion for failure to exhaust administrative remedies, the Court
3 can decide disputed issues of fact with regard to this portion of the case. *See generally Albino,*
4 *747 F.3d at 1172-73; Stratton, 697 F.3d at 1008.*

5 c. Defendants shall file a reply brief no later than fourteen days after the date
6 Plaintiff's opposition is filed.

7 d. The motion shall be deemed submitted as of the date the reply brief is due. No
8 hearing will be held on the motion unless the Court so orders at a later date.

9 6. Discovery may be taken in this action in accordance with the Federal Rules of Civil
10 Procedure. No further court order pursuant to Rule 30(a)(2) or Local Rule 16 is required before
11 the parties may conduct discovery.

12 7. It is Plaintiff's responsibility to prosecute this case. He must keep the Court informed
13 of any change of address and must comply with the Court's orders in a timely fashion. Failure to
14 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of
15 Civil Procedure 41(b).

16 8. Extensions of time are not favored, though reasonable extensions will be granted. Any
17 motion for an extension of time must be filed no later than three days prior to the deadline sought
18 to be extended.

19 9. The Clerk is directed to change the designation of this case from a habeas corpus action
20 to a prisoner civil rights complaint.

21
22 IT IS SO ORDERED.

23 Dated: December 1, 2017



24
25 KANDIS A. WESTMORE
26 United States Magistrate Judge
27
28